88-649

Supreme Court, U.S.
FILED
AUG 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JACK E. CRAVENS,

PETITIONER,

v.

STATE OF WASHINGTON,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FORD, NEES & NORDSTROM, P.S.

By: STEPHEN L. NORDSTROM
ATTORNEY AT LAW
S. 323 PINES ROAD
SPOKANE, WA 99206
(509) 924-9800

Date: September, 1988

A. QUESTION PRESENTED FOR REVIEW

By ordering a mistrial and denying defendant's motion to dismiss, did the Court deprive the defendant of his constitutional right against twice being placed in jeopardy, where, in direct contradiction with all existing federal and state decisions, the Court held that the mere mention of the word polygraph constituted prejudicial error.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW (A) . .	i
Table of Authorities	iii
OPINION BELOW (B)	2
JURISDICTION (C)	2
CONSTITUTIONAL PROVISIONS (D)	
I. The Fifth Amendment of the United States Constitution .	2
II. The Fourteenth Amendment of of the United States Constitution	3
STATEMENT OF THE CASE (E)	
I. Course of Proceedings in the case now before this Court	4
II. Relevant facts concerning the mistrial	5
EXISTENCE OF JURISDICTION BELOW (F) .	16
CONCLUSION (G)	31

TABLE OF AUTHORITIES

Pages

A. UNITED STATES SUPREME COURT CASES

Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) . . . . . passim

United States v. Perez, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824) 20, 23

B. OTHER FEDERAL CASES

Brady v. Samaha, 667 F.2d 224 (1st Cir. 1981) . . . . . passim

United States v. Sanders, 591 F.2d 1293 (9th Cir. 1979). . . . 25

C. WASHINGTON CASES

State v. Descoteaux, 94 Wn.2d 31, 614 P.2d 179 (1980) rev'd on other grounds, 97 Wn.2d 225, 643 P.2d 882 (1982) 30

State v. Lavaris, 99 Wn.2d 851 664 P.2d 1234 (1983) 30

D. OTHER STATE CASES

Hutchins v. State, 334 S.2d 112 (Fla.App. D3 1976), cert. denied 341 S.2d 291 (Fla. 1976) 30

Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974) 30

People v. Parisie, 5 Ill.App.3d 1009, 287 N.E.2d 310 (1972) . . 30

State v. Lamatty, 263 N.W.2d 559 (Iowa App. 1977) 30

Sullivan v. State, 303 S.2d 632 (Fla. 1974), cert. denied 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220, reh'g denied 429 U.S. 873, 97 S.Ct. 190, 50 L.Ed.2d 154 (1976) 30

Wiese v. State, 357 S.2d 755 (Fla.App. D4 1978) 30

E. UNITED STATES CONSTITUTIONAL PROVISIONS

AMENDMENT V, Due Process Clause . . . 2

AMENDMENT V, Double Jeopardy Clause . 2

AMENDMENT XIV, Due Process Clause . . 3

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JACK E. CRAVENS,

PETITIONER,

v.

STATE OF WASHINGTON,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Jack E. Cravens respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 12, 1988.

B. OPINION BELOW

The opinion of the United States Court of Appeals for Ninth District (Appendix A) was not reported. The opinion of Federal District Court below (Appendix B) was not reported.

C. JURISDICTION

The judgment of the Court below, (App. A) was entered April 12, 1988, rehearing was not sought. The jurisdiction of the Supreme Court is established pursuant to the Constitution of the United States under the due process clauses of the Fifth and Fourteenth Amendment.

D. CONSTITUTIONAL PROVISIONS

1. The Fifth Amendment, United States Constitution provides:

ARTICLE [V.]
No person shall be held to

answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment, United States Constitution Section 1, which provides:

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

E. STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS IN THE CASE NOW BEFORE THIS COURT

On July 2, 1985, the Trial Court in this matter granted the prosecution's Motion for Mistrial over defendant's objection. That Order was formally entered July 19, 1985.

Following exhaustion of State remedies, a Writ of Habeas Corpus was filed in Federal District Court, Eastern District of Washington, on March 31, 1986. A hearing followed on April 4, 1986 and continued on April 18, 1986. An Order denying the defendant's Petition for Writ of Habeas Corpus was issued on May 29, 1986. Defendant then moved for reconsideration on June 9, 1986, which was denied on June 12, 1986.

On June 17, 1986, Notice of Appeal was filed with the Ninth Circuit Court of

Appeals, and on June 24, an Order was entered granting "petitioner's request for Certificate of Probable Cause."

On April 12, 1988, a judgment was filed and entered in the United States Court of Appeals for the Ninth Circuit, affirming the District Court's judgment that a Writ of Habeus Corpus be denied.

II. RELEVANT FACTS CONCERNING THE MISTRIAL

Appellant Jack E. Cravens was arrested and charged with second degree theft of $552.00 building material from Ziegler Lumber Company. (App. C, P. 8, L. 12) The allegations stemmed from an alleged confession by Charles Astor that he had worked with Mr. Cravens in appropriating building materials from Ziegler's without paying for them. (App. C, P. 26)

Mr. Vern Ziegler was called as the State's first witness during which time

he testified to a decrease in gross profits (App. C, PP. 19-21) which led to his subsequent investigation of the invoices of Ziegler Lumber Company in the first part of 1985 (App. C, P. 21, L. 13), and suspicions that the defendant, and employee Charles Astor were involved. (App. C, PP. 25-26) Defense counsel objected to this line of questioning as being irrelevant to the charge ($552.00 theft), but the Court overruled this objection. (App. C, P. 20) However, during cross examination, Mr. Ziegler admitted that he didn't actually know if there were any theft losses (App. C, P. 54), but that he did suspect there were a few employees involved in stealing. (App. C, PP. 54-55) Additional questions were asked regarding another possible thief but the State objected to this line of questioning and the Court sustained the objection. (App. C, P. 58) Defense

counsel indicated he would like to make an offer of proof and the Court directed counsel to approach the bench. (App. C, P. 59) During that conference the Court told counsel.

> I think that you can sufficiently argue Mr. Ziegler's strong feelings about identifying the thieves from the testimony that you are now eliciting without going into why he may have accused someone else... (App. C, P. 60, L. 21)

The trial continued with defense counsel inquiring of the witness:

> Mr. Ziegler, in an effort to identify stealing by your employees at Ziegler Lumber, did you have your employees take polygraphs? (App. C, P. 61, L. 5)

The State immediately objected to this question and the Court sustained the objection after which the parties approached the bench. (App. C, P. 61, L. 9) Out of the hearing of the jury, the prosecution's first statement was, "I think I am forced at this time to ask for

a mistrial". (App. C, P. 61, L. 15) During the argument that followed the state recited its belief that, "...the fact of a polygraph, or anything even tangently related to polygraphs (can not come before the jury." (App. C, P. 61, L. 15) However, the State had previously admitted it had not researched the issue. (App. C, P. 61, L. 21)

During this time frame the Court made its only reference to the jury, stating: "The jury would wonder why aren't the results brought out." (App C, P. 63, L. 21) The judge then stated, "I am disposed to grant the mistrial". (App. C, P. 63, L. 23)

Defense counsel had previously indicated he had not briefed the issue, (App. C, P. 62, L. 2) and asked for a brief recess to review the law, but the Court did not repond to the request. (App. C, P. 64, L. 1) Following a short

discussion, the State asked that the question be reread, stating:

> If your question was: Did you require employees to take polygraphs, I believe Mr. Ziegler can testify "no", and if we drop it at that, we may be able to salvage it. If the question was: Did you administer polygraphs, the Mr. Ziegler is going to have to answer "yes," and we can explain it away as a fishing expedition by counsel as to the issue of polygraphs, depending upon how it came out... (App. C, P. 65, L. 15)

Following the rereading, the State reiterated it was asking for a mistrial. (App. C, P. 66, L. 22) The State's rationale for this position was:

> I don't believe that the issue of polygraphs -- the running of a polygraph -- can be admitted into evidence in this case. I believe that just the fact of the questions, irrespective of the answer, has prejudiced the jury so badly that they are going to be wondering what the results of this polygraph are, and the State's position is that we can't get into it;... (App. C, P. 66, L. 23)

Defense counsel stressed that it did

not want a mistrial and suggested, as an alternative, that perhaps some follow-up questions highlighting the fact that polygraphs were inadmissible could resolve the problem. Counsel indicated he hadn't given a lot of thought to how to salvage the matter at that point but thought it may be a solution. (App. C, P. 68, L. 13) Defense co-counsel then stated that since the question wasn't answered, "I don't see why this can't be solved by just having the jury admonished to disregard that last question." (App. C, P. 68, L. 17) The Court did not respond to either request except to say:

> ...you would no doubt understand how easily you would be upset at the prosecutor asking such a question and saying in argument that once the bell has been rung, that's it. ...and the bell has been rung here. (App. C, PP. 68-69)

The Court then made an interesting observation, indicating that had the word

"investigation" been substituted for the word "polygraph" that the question submitted to Mr. Ziegler would have been appropriate:

> There could have been a question submitted to Mr. Ziegler: Did you undertake an investigation, and as a result of that investigation, did you believe that other people employed by you had stolen? You could have brought it out that way, without introducing this business of lie tests. Your pre-trial efforts to obtain the lie tests were obviously for the purpose -- and the court permitted it, for just one purpose -- and that is to determine whether or not there may have been some collaboration on the part of employees to steal and that sort of thing that might be exculpatory to Mr. Cravens;... (App. C, P. 69, L. 4-23)

The Court concluded its observation by again berating defense counsel for his unjustified question. (App. C, P 69; see also P. 63, L. 12, 18-19, 24; P. 64, L. 22; P. 69, L. 2) The Court then stated, "The court will declare a mistrial." (App. C, P. 69, L. 23) The jury was then

recalled and excused. (App. C, P. 71, L. 14)

The trial transcript reveals that the morning session of trial commenced at 9:30 a.m. (App. C, P. 49) Twelve pages of transcript follow prior to the point where defense counsel asked the fateful "polygraph" question. (App. C, P. 61) An additional eight pages follow until the mistrial is declared. (App. C, P. 69) The total elapsed time from the commencement of the morning session until the declaration of the mistrial was less than 60 minutes. (App. C, P.71) Since twelve of the twenty pages of transcript preceded defense counsel's question, and only eight pages of transcript until the actual declaration of mistrial, the Court's total consideration of the mistrial issue arguably took less than twenty minutes.

Following the noon recess, defense

counsel, citing substantial case law regarding a judge's responsibility prior to granting a mistrial, made a motion to dismiss the case with prejudice on the basis of double jeopardy. (App. C, PP. 72-76) The State indicated it could respond, however, it preferred time to research the issue. (App. C, P 76, L. 7) The Court stated, "I think in fairness to the State, that (the State) should be entitled to have an opportunity to respond." (App. C, P. 76, L. 24) The Court then recessed. (App. C, P. 77. L. 22)

The following morning (the jury having already been released), counsel for the defense and the State argued the issue before the Court. The Court then responded by denying the motion to dismiss. (App. C, P. 108, L. 20)

The Court's primary rationale for granting the mistrial appears to be that

by asking the polygraph question, defense counsel had alerted the jury to the fact employees had been stealing from Zieglers:

> In looking at the situation which had developed during the trial here, up to the point of the propounding of this question to witness Ziegler, the background shows that during opening statement for the defendant, counsel remarked that the jury would find that there was a thief here -- thieves, really, not Mr. Cravens, but Mr. Astor, apparently, and Mr. Hunter, employees who would be shown to the jury who had been stealing from Ziegler Lumber. So the defendant has alerted the jury to this other issue, right from the outset, as to whether or not this defendant is the one at fault and criminally responsible, or those others in the employ of Ziegler Lumber Supply. (App. C, P. 101, L. 21)

This reasoning is obviously faulty since it was the State, and not the defendant, who apprised the jury of this "other issue". During opening statement, the prosecutor stated: "It is our posi-

tion that there was a conspiracy between the person who was working for Ziegler -- and you will find out that his name is David Hunter -- and Mr. Cravens..." (App. C, P. 5, L. 10)

The Court then addressed the suggestion proposed by defense counsel prior to the granting of the mistrial that the jury be instructed to disregard the question:

> The decision of this court in determining that the error was such that the State could not have a fair trial was prompted not only by the circumstances which I have earlier alluded to, but the fact that any alternative which was suggested here, the sole one being that the jury be instructed to disregard the question, wouldn't have cured the situation, ...The jury wouldn't have disregarded that, and we know it. It would wonder "what are we not being told here, aren't we entitled to find out what the results of these tests are?" And, of course, they can't. And the prosecutor can't get it in. And it's the defendant who brought it up. It's the defendant who pro-

> pounded the question. And now the defense wants to have the case dismissed because of this sort of activity. (App. C, P. 105, L. 20)

Finally, in support of its determination, the Court stated:

> (defense counsel's improper question) presented a situation where the State was obliged to object to a very critical question in the minds of the jury. And to try and apparently as far as the jury was concerned, keep out any reference to polygraph results. And the jury was, therefore, left to speculate what happened here. (App. C, P. 108, L. 7-12)

The Court had determined that the foregoing facts supported a finding of "manifest necessity", justifying the mistrial (App. C, P. 108)

F. EXISTENCE OF JURISDICTION BELOW

The Ninth District Court of Appeals has decided a Federal question in a way that conflicts with applicable decisions of the Court.

This is a double jeopardy issue. At the time of the Appeal to the Ninth Circuit, Federal Courts had relied on and referred to Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed 2d 717 (1978).

The facts of Arizona, including the prejudicial statements made there by defense counsel as well as the trial judge's response, are concisely set forth at Page 514, Footnote 34:

> In this case, defense counsel made brief reference during voir dire to the fact that evidence was withheld from the defense at the previous trial. Later in the voir dire the prosecutor expressed his concern to the trial judge that if the jurors were aware of the fact that respondent obtained a new trial because the prosecution failed to produce some evidence, they might be prejudiced against the State. In response to the prosecutor's concern, the trial judge conducted an inquiry into whether the jurors knew the reason for the new trial. The inquiry revealed that the jurors were not then aware of the reason

for the new trial. During the opening statements which followed, however, defense counsel did not leave the matter to the jurors' conjecture; instead, he explicitly stated that they would hear testimony showing that the Supreme Court of Arizona granted respondent a new trial because the prosecutor deliberately withheld exculpatory evidence from the defense. Following completion of opening argument, the prosecutor moved for a mistrial.

During argument on the prosecutor's motion, defense counsel insisted that evidence of prosecutorial misconduct in a prior proceeding was admissible for impeachment purposes; although he could offer no authority to support this novel proposition, he indicated to the judge that he would appreciate an opportunity to "find ...some written law, which would allow this type of testimony...as evidence." Supra, at 500 n 3, 54 L.Ed.2d 725. While the trial judge remarked that he could conceive of no basis for the admission of such evidence and that he was tempted to grant the prosecutor's request immediately because of defense counsel's injection of the prosecutorial misconduct issue into the trial, supra. at 499-500 n 3, 54 L.Ed.2d 724-725, he did not act precipitately, rather, proceeding with caution and giving defense

> counsel the benefit of the doubt, App. 223, the trial judge reserved ruling on the admissibility question and at first denied the mistrial motion. In avoiding a hasty decision despite his conviction that the evidence was improper, the trial judge was plainly acting out of concern for the double jeopardy interests implicated by an improvident mistrial. (Id., at 2-25, 2-53)
>
> The following day the prosecutor renewed his motion. The trial judge heard extensive argument from both sides regarding both the propriety of defense counsel's opening statement and the need for a mistrial. Defense counsel contended that any prejudice which might have resulted from the references to prosecutorial misconduct could be cured by cautionary instructions; the prosecutor argued that such an alternative would be inadequate to remove the risk of taint.

In analyzing whether particular facts warrant a mistrial, the Court in Arizona v. Washington, discussed the defendant's "valued right' to have the trial concluded by a particular tribunal and that because of the importance of this right, stated:

> The prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant. Arizona v. Washington, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717.

Emphasizing the caution that should be exercised before granting a mistrial, the Court referred to Mr. Justice Storey's classic formulation:

> To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes... United States v. Perez, 9 Wheat., 579, 580 6 L.Ed. 165 (1824)

(Id. 506) In light of this strong language by the Court, it is interesting to note that after emphasizing how heavy the prosecutor's burden is and the great caution to be exercised by a judge before granting the prosecutor's request, that the Court never incorporates this "heavy

burden" into its analysis but structures its opinion in reference to "judicial deference". (Id. 509-516)

In formulating its opinion, the Court discussed various factual situations where a mistrial could be necessary and that, although there were different degrees of necessity, a "high degree" of necessity was required before concluding a mistrial was appropriate.

In the factual setting before Arizona v. Washington, this Court also stated, "the defendant's lawyer had made improper and highly prejudicial remarks ...". Because of the nature of those remarks and, "the trial judge's evaluation of the likelihood that impartiality of one or more jurors may have been affected...", (511) the Court concluded the trial judge's determination was entitled to "special respect". (Id. 510-511)

In light of that "special respect", the Arizona Court reviewed the trial judge's actions and found that by proceeding with caution, giving defense counsel time to research the issue and by initially denying the mistrial, he had not acted precipitately in response to the request for a mistrial. (Id. 514, N. 34; also 515) That he evinced concern for possible double jeopardy consequences giving both counsel full opportunity to explain their positions. Furthermore, the judge acted "responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding." (Id. 515-516)

The court was persuaded that the combination of these factors revealed an exercise of "sound discretion" on the part of the trial judge sufficient to support the "high degree" of necessity

required. (516)

Although it is often difficult to draw a comparison between cases, Brady v. Samaha, 667 F.2d 224 (1st Cir. 1981) provides the one constant that has existed in every case of this nature since U.S. v. Perez, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824):

> The one constant is that the actions of the trial judge in arriving at the decision to declare a mistrial must have been scrutinized in an effort to ensure that a "scrupulous exercise of judicial discretion" led to the decision. (229; citations omitted)

A review of the facts in the instant case reveals no such "scrupulous exercise of judicial discretion".

In contrast to the "responsible", "deliberate" and "careful consideration" exhibited by the Arizona trial judge through his non-precipitant response to the prosecutor's request for a mistrial and his obvious concern for double

jeopardy consequences, the trial judge in the present case failed to provide defense counsel with time to research the mistrial issue. (Appendix C, P. 64, L. 2) The State had already indicated it had not researched the issue. (App. C, P. 61, L. 21) The judge failed to address the alternatives posed by defense counsel when the record is clear that there was no affirmative statement of any possible jury bias. (App. C, P. 68, L. 4) The trial judge's only comment regarding this issue was, the jury would wonder why aren't the results brought out", (App. C, P. 63, L. 21) "...once the bell has been rung, that's it. ...and the bell has been rung here." (App. C, P. 68, L. 21) This failure to address possible alternatives emphasizes the lack of "the scrupulous exercise of judicial discretion," Brady, supra.:

Whether or not the record indi-

> cates he has considered alternatives to a mistrial is significant. (229, citations omitted)

See also U.S. v. Sanders, 591 F.2d 1293, 1299 (9th Cir. 1979) where the Court stated:

> The record must support the explicit or implicit finding of a "manifest necessity". This is especially true...when the record...reveals that the judge failed to adequately consider feasible alternatives to a mistrial...

In addition, the trial judge failed to provide full opportunity to defense counsel to explain his position, cutting him off in mid-sentence exclaiming, "and you interjected it, and that's the problem." (App. C, P. 63, L. 17) Brady, in citing numerous cases including Arizona addresses this factor as well. "Also of major importance is affording counsel an opportunity to be heard on the subject." (Brady, supra., at 229)

Furthermore, the trial judge's own

statement rather than revealing a "scrupulous exercise of judicial discretion", exemplified a judge who was "hot under the collar". (App. D, P. 28, L. 1). The trial judge stated:

> I feel the interjection of this subject of lie tests is very prejudicial, and I think there is no justification for it, even though everyone knows that it occurred. The law is very clear that no one can introduce results of lie tests. (App. C, P. 63); and you interjected it and that's the problem (Id. at 63); I think that this was a deliberate endeavor to inject something that is entirely inadmissible (Id. at 63); ...But this deliberate injection of the fact of polygraphs is what is so prejudicial, and we know that the law is that the fact of lie tests and the results of lie tests are just an anathema. (Id. at 64) ...Once a bell has been rung, that's it. (Id. at 68) It was rung deliberately by the injection in this question of the fact of lie tests. (Id. at 69); But this business of inquiring as to fact of lie tests is entirely unjustified. (Id. at 69)

Reference to defense counsel's "deliberate injection" of the question is mis-

leading since the Court was aware that this was defense counsel's first trial and that Mr. Schweda had been associated as counsel for that very reason. In addition, as noted below, there is absolutely no case law to support the Court's statement that the "subject of lie tests is...prejudicial".

Finally, unlike the Arizona Court, which found defense counsel's "hidden evidence" and the reference to the prosecutor's misconduct requiring the Supreme Court of Arizona to grant a new trial to be "highly prejudicial". Arizona v. Washington, 434 U.S. 497, 515, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). In the present case, the trial judge acknowledged that had defense counsel posed the question as an "investigation" and had not included the word polygraph, that the question would have been acceptable:

There was no need for it.

> There could have been a question submitted to Mr. Ziegler: Did you undertake an investigation, did you believe that other people employed by you had stolen? You could have brought it out that way, without introducing this business of lie tests. (App. C, P. 69)

The obvious question suggested by this comment is, if the information illicited from that question would have been acceptable except for the mere mention of the word "polygraph", what possible prejudice could have followed? It is clear that this same question existed in the mind of Judge Quackenbush:

> The thing that concerns me in this case the question was asked, which didn't suggest any answer at all, the question was were polygraphs submitted to employees. The question was never responded to, and so I have a concern as to what possible prejudice or jury bias resulted just from that question. (App. D, P. 17, L. 10); But what possible bias or prejudice could be created against the State by that question. (Id. at 18); What possible prejudice or bias against the State was created by that

> asking of the question without any response? (Id. at 19); Why wouldn't just instructing the jury to disregard the question have cured the whole thing? (Id. at 21); I sensed that his ruling, the granting of the mistrial and I think the whole transcript even confirms that he was a little bit hot under the collar, because the question was asked, as you confirmed and you were there, that his biggest concern was the defense attorney, Mr. Janecek, even asked the question. But the question was or didn't lead anyone to conclude whether or not polygraphs were given. The question was, were they given...and I am having difficulty seeing how that prejudiced the State. (Id. at 27, 28); Well, I don't think the mere mention of the word "polygraph', and that's all there was in this case, is a basis for a mistrial. (Id. at 30)

There are numerous federal and state cases which specifically support the conclusion that defense counsel's mere reference to the polygraph is not prejudicial:

> The mere fact a jury is apprised of a lie detector test is not necessarily prejudicial if no inference as to the

> result is raised. State v. Descoteaux, 94 Wn.2d 31, 614 P.2d 179 (1980) rev'd on other grounds, 97 Wn.2d 255, 643 P.2d 882 cert. denied (1982).

This statement is quoted in State v. Lavaris, 99 Wn.2d 851, 860, 664 P.2d 1234 (1983) which then indicates:

> It may be the better practice to eliminate any reference to any kind of polygraph, but that it cannot be determined error merely because it was introduced before the jury.

See also Sullivan v. State, 303 S.2d 632, (Fla. 1974) cert. denied 428 U.S. 911, 98 S.Ct. 3226, 49 L.Ed.2d 1220 reh'g denied, 429 U.S. 873, 97 S.Ct. 190, 50 L.Ed.2d 154, (1976); Hutchins v. State, 334 S.2d 112 (Fla.App. D3 1976) cert. denied 341 S.2d 291 (Fla. 1976); People v. Parisie, 5 Ill.App.3rd 1009, 287 N.E.2d 310 (1972); State v. Lamatty, 263 N.W.2d 559 (Iowa App. 1977); Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974); see also Wiese v. State, Fla.App. D4 357 S.2d 755,

where the Court found that reference to the polygraph not only failed to constitute prejudicial error but because the results of the polygraph test were not divulged there existed no error at all.

G. CONCLUSION

This writ is directed primarily at the issue of deference to be shown the trial judge. However, it is clear in numerous cases, including Arizona, supra, deference derives efficacy by an exercise of "sound discretion" on the part of the trial judge.

> [i]f the record reveals that the trial judge has failed to exercise the "sound discretion" entrusted to him, the reason for such deference by an appellate court disappears. Arizona v. Washington, 434 U.S. at 510 N28, 98 S.Ct. at 832 N.28; see also Brady v. Samaha, 667 F.2d 224 at 229 (1st Cir. 1981)

And when there is such an obvious absence

of factual support for declaring the mistrial, coupled with sound case law that mere reference to the polygraph is not prejudicial as is the case in the present matter, it would be unconscionable to find the Trial Court in the present matter acted with "sound discretion".

For the reasons set forth, appellant respectfully urges that the Order of the United States District Court for the Eastern District of Washington be reversed and a Writ of Habeas Corpus be issued prohibiting Jack E. Cravens from being retried.

Respectfully submitted this 4th day of August, 1988.

FORD, NEES & NORDSTROM, P.S.

STEPHEN L. NORDSTROM
Attorney for Appellant